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Minority Rights Issues in Post-Apartheid South Africa

H.A. STRYDOM*

I. INTRODUCTION

On drawing parallels between Canada's and South Africa's political and constitutional developments, a Canadian scholar remarked in 1993 that both countries were "in the midst of deep crises because of their failure to satisfactorily reconcile nineteenth century liberal nationalism with sharply conflicting ethnic and racial diversities."¹ In April 1994, South Africa held landmark post-apartheid democratic elections, and a new constitutional dispensation of distinct liberal design² became the blueprint for a liberated and democratic society in South Africa. This new constitutional dispensation was embodied in two negotiated documents: the Interim Constitution of 1993³ and a new or final constitution a democratically elected Constitutional Assembly adopted in 1996.⁴

Both documents envisage a society based on the recognition of human rights, democracy, and peaceful co-existence. They pursue the creation of national unity among a diversity of origins, cultures, languages, and persuasions. In the pursuit of these ideals, however, the pitfalls are many and the potential for failure is considerable. Hence, one may be skeptical about a solution that

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1. B.D. Tennyson, *The Failure of Liberal Nationalism: The Constitutional Evolution of Canada and South Africa*, 2 J. FOR CONTEMP. HIST. 1 (1993).

2. See Heribert Adam, *Ethnic Versus Civic Nationalism: South Africa's Non-Racialism in Comparative Perspective*, 7 S. AFR. SOC. REV. 15, 23 (1994) ("For the time being, South Africans have responded with a temporary liberal constitution, but mainly rely on an inter-dependent economy and an interspersed population to keep a tenuous divided state from fragmenting. The South African nation has yet to be born.").

3. S. AFR. CONST. (Act 200 of 1993).

4. S. AFR. CONST. (Act 108 of 1996).

glosses over diverse identities and aspirations. Whether this accusation fits the new legal and constitutional order in South Africa is perhaps not self-evident. Some may even question its soundness and argue that the new legal order adequately provides for the aspirations and needs of minority groups. Not to be dismissed, though, are the varied reactions against the present dispensation and especially against the manner in which it is implemented. To belittle the reaction as an inability to accept the fundamental changes in society or as an attempt to secure past privileges is not only misplaced in many instances, but may also be a deliberate disregard for the interests and aspirations of certain sections of society.

This Article examines the disposition of South Africa's current legal order toward the protection of minorities. It focuses on three general themes: past and present ideological positions and their alienating effects; the scheme of minority protection under the Interim and new Constitutions; and future options.

II. THE POLITICS OF ASSIMILATION AND EXCLUSION

In a recent article, Professor Thomas Franck correctly ascribed the bloody conflicts of our time and the private struggles for identity to the confluence in political ideology of two concepts: nation and state.⁵ In South Africa's political discourse, the confusion between nation and state played a fundamental role in the design of past policies, and post-apartheid doctrines on different sides of the political spectrum often suffer from the same malady. The alienating effect of these doctrines gives rise to much of the anxiety about the protection of certain communities, which is further complicated because South African perspectives and positions on minority rights are deeply immersed in and dictated by strategic concerns with political competition and conflict. At this juncture, ascriptive identities and partisan loyalties in the distribution of public goods still characterize South Africa and are constant sources of doubt in the ability of the constitutional order to administer even-handed justice.

5. See Thomas Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 360 (1996).

A. Logic of Ethno-nationalism

The dominant perspective that the boundaries of a cultural community and the state must coincide defined both the black homeland policy of the apartheid government and the idea of a white homeland, once prevalent among white reactionary movements.⁶ This identification of state and cultural community had two notorious consequences. First, it had a colonizing effect on society: all societal institutions, whether economic, educational, legal, political, or social, had to display the characteristics, interests, and desires of the communal and national will. Second, cultural groups were perceived as political groups. Consequently, the state as the political form and organization of an ethno-national community had to assume the function of the political precondition for cultural survival. The cultural community was then free to make the instruments of state power subservient to its needs and aspirations, which the colossal social engineering experiment under apartheid graphically demonstrated. Apartheid attempted to culturally and ethnically "cleanse" South Africa by creating separate homelands for ethnically diverse black population groups and by designing an alternative legal system for blacks who could not be persuaded to leave white South Africa and settle in their respective culturally and ethnically "pure" homelands.

The legacy of this thinking still exists in a variety of contexts and also arises in the minority rights debate. After the inauguration of members of the Volkstaat Council under the Interim Constitution,⁷ for example, a spokesperson for the Council commented:

The Volkstaat must be a cultural home for the Afrikaner, in the

6. Currently, it is difficult to say how strong this idea still is. While some have not discarded the idea altogether, other forms of autonomous rule may appeal to a wide spectrum of conservatives.

7. See S. AFR. CONST. (Act 200 of 1993) § 184(A). The inclusion of this section in the Interim Constitution is the result of an agreement between right wing organizations and others participating in the negotiations for an interim constitution. The purpose is to provide some mechanism for the implementation of self-determination. The Council consults the government on the available self-determination options, and acts in an advisory capacity only.

same way as Israel is the home for the Jews. It must be a place where our children and grandchildren can maintain their political self-determination to ensure the survival of the Afrikaner nation as a cultural group.⁸

This thinking usually translates cultural differences into political differences, thus refuting the idea that the state is the custodian of all cultural groups. Moreover, such an equation between cultural and political self-determination raises a question concerning the viability of fundamental rights protection. Because the state is regarded as the embodiment of a single cultural community, other cultures and their rights either must be excluded from the state's custodianship or must constantly be put at risk by the state-assuming culture.

Another example concerns the way that a certain class or culture, or certain ethnic or racial group can represent a guardian class with a distinct calling and competence to preserve and defend certain values and standards. Such representation may lead to the privileging of a specific culture and of the institutions that supposedly represent that culture if the group gains special forms of protection and eventually some form of political control.⁹ It is beyond question that certain elements of the white community are guilty of employing this strategy in the current debate. The following discussion demonstrates, however, that this example apparently has a special appeal to the new governing class, which follows it with alacrity.

B. Nostalgia with Africa

The advent of a new political dispensation in South Africa has also given birth to a new transformationalist discourse, which has emerged in defense of a new cultural value system in which African people assume the position of the vanguard race. This cultural value system assumes an overriding function in the affairs of the nation and rises to the level of a supreme norm by which human action is judged and declared morally defensible or indefensible. As seen with the ethnically determined "Volksgeist" the new cultural value system exists in organic harmony with the instruments

8. CITIZEN, June 16, 1994, at 4.

9. Cf. P.J. Visagie & J.L. Pretorius, *The Ideological Structure of the Minority Rights Discourse in South Africa*, 8 S. AFR. PUB. L. 53, 57 (1993).

of power and seeks to colonize all other institutions. It is distinctly racially aligned. Where this new design is used to transform or restructure South African society, the following three principles have emerged.

1. The composition of even non-state institutions is judged in accordance with a simple numbers game.

According to the popular post-apartheid slogan, all institutions must reflect the national demographics of the country. Regional peculiarities and other relevant considerations are consequently subsumed under a mathematical calculation.

2. In the education field, an outbreak of cultural frenzy demands that institutions become Africanized and democratized.

The arguments for such transformation are essentially political and not educational; they deal with the introduction of a new elite culture, representativity, and control of management bodies.¹⁰ Individuals who are familiar with the rhetoric of Christian-national education under apartheid will immediately recognize the decisive influence of a specific culturally determined understanding and interpretation that lords over the manifold diversity of interests and aspirations of different communities. Consequently, transformation and all of its implications are subsumed under a cultural and racial imperative. The demand for the democratization of non-state institutions also displays a lack of understanding for the inherent differences between the political and non-political spheres of our existence.¹¹ Democratic representativity applies beyond its constitutional limits as the supreme political value for even the non-political institutions of society. Thus, openings exist for attempts to make everything subservient to the needs and desires of the leading political movement—a strategy followed by the nationalist government with devastating consequences.

10. See generally H.A. Strydom, *The Unicolor Rainbow Nation*, 2 J. FOR JURID. SCI. i (1996) (dealing with the debate more fully).

11. See HANS KLEIN, *DIE GRUNDRECHTE IM DEMOKRATISCHEN STAAT* 44 (1974).

3. Critical remarks by whites on government policy and action are rejected as Eurocentric and racist.

It is suggested that society should conform to a new standard of conduct guided by a particular group culture of which all institutions should become the ultimate guardians. Individuals who refuse to submit themselves to the imperatives of the new official identity become settlers or obstructionists—popular terms for labeling others in the new leadership elite's vocabulary.

These attitudes ultimately lead to the alienation and marginalization of groups that do not form part of the dominant culture and create relationships of domination and subordination—something that should be quite familiar to the new governing elite. Where this poses a real or perceived threat to the rights and interests of communities, the tendency exists to seek protection from a familiar and enclosed "cultural" environment and to reinforce it with political mechanisms. This is perhaps the true tragedy of the present situation in South Africa: the old and the new communicate with the same vocabulary and employ the same strategies. The symbiosis is nearly perfect.

C. Rediscovery of the Proletarian Paradise

In the 1980s, shortly before Marx was buried for the second time, a collection of essays, many of which were authored by prominent ANC members, was published under the title *The National Question in South Africa*.¹² As the title hints and the introduction confirms, the publication treated the curious reader to a Marxist–Leninist analysis of the South African situation. The main message of this gospel was that liberation must ultimately aim at a socialist reconstruction of South Africa.

The class earmarked for this messianic task was the black worker. Through the black worker, we will not only arrive at our socialist future, but will also experience the deepening of national unity in economic, political and cultural life necessary for the achievement of one nation. Nation-building in this sense means a unification of the working class as the leading class whose culture, aspirations and economic interests must become increasingly those

12. THE NATIONAL QUESTION IN SOUTH AFRICA (Maria Van Diepen ed., 1988).

of the majority in South Africa.¹³

This eschatological faith in a proletarian future has not lost its allure for some prominent leaders in the post-apartheid political industry. Two contributions in a recent edition of *The African Communist* by two ANC members of Parliament and leading figures in the South African Communist Party shed more light on this.¹⁴ In both instances, the central theme is how to deal with the emergence and apparent resilience of ethnic, racial and other identities in post-apartheid South Africa from a Marxist perspective on nationalism and national unity or identity. The challenge according to the authors is to advance the national democratic revolution beyond its current limited aspirations, democratization, non-racialism and national self-determination, to a more complete stage which will see the realization of a socialist society and new South African nation based on the cultures, values and interests of the African working class.

Once the new nation or national identity becomes imbued with the hegemonial working class and its economic interests, the divisions will be obliterated because the working class will tolerate only the "culture, values and interests of classes and strata outside this alliance that are reconcilable with it."¹⁵ All areas, even voluntary associations, are "terrains of contestation which the working class must occupy."¹⁶ This "deepened sense of transition" will even change our understanding of concepts, such as non-racialism, which will be given a more specific (hegemonial) cultural and class content. The new bill of rights and constitutional recognition of diversity apparently must obey this imperative and assume a new function to help in the construction of a national working class

13. See generally H.A. Strydom, *Self-Determination: Its Use and Abuse*, 17 S. AFR. Y.B. INT'L L. 90, 104-08 (1991/92) (discussing this publication in more detail).

14. See Yunus Carrim, *The National Question in Post-Apartheid South Africa-Reconciling Multiple Identities*, THE AFR. COMMUNIST, Third Quarter 1996, at 49; Philip Dexter, *Marxism and the National Question in a Democratic South Africa*, THE AFR. COMMUNIST, Third Quarter 1996, at 59.

15. Carrim, *supra* note 14, at 51.

16. Dexter, *supra* note 14, at 62-63.

identity.¹⁷ Thus, it is not surprising to learn from one of the learned authors that the "particular flavor given to the concept of nationhood in South Africa as influenced by the notion of reconciliation seems to represent a potential threat to a progressive definition of a South African identity."¹⁸

As in the case of ethno-nationalism and africanization, the introduction of a mass workers culture to bridge certain divides in favor of a single national identity has two consequences, which normally operate as flip sides of the same coin. First, it has an exclusionary and alienating effect on certain sectors of society. Second, it paves the way for *identification* of a certain group or class with the state. Consequently class interests and aspirations become translated into state interests and aspirations. As a result, any limitation on state power remain wishful thinking. What reflects the needs of the hegemonial class at a given time becomes at once the law of the state.

One possible explanation for these extreme and reactionary positions is that they assume the function of pastoral homes for sections of a society in which a common political and legal culture is still largely absent. They are places of refuge, providing the sense of belonging, identity and security a common, internalized political and legal culture would otherwise be capable of providing.¹⁹ As long as the center stage is occupied by forces competing for hegemonial positions, they will constantly be suspicious that the institutions of power may fall victim to the whims of pariah political entrepreneurs who will create centers of patronage and preferment. The status-degradation and alienation that certain groups experience in such a fluid environment usually becomes a powerful force in the formation of communal identities, in which loyalty to the group supersedes other loyalties.

Important questions thus remain: what position does the new constitutional order represent in this environment; will it succeed in establishing the kind of legal basis that will unify on the one hand and still be sufficiently accommodating towards diverse aspirations on the other; and how real is the threat of the constitutional order falling victim to powerful partisan interests? Some

17. See Carrim, *supra* note 14, at 55-56.

18. Dexter, *supra* note 14, at 59.

19. See Adam, *supra* note 2, at 20-21.

questions may only find answers through the lapse of time. For present purposes, prudence dictates concentration on what the new order offers or fails to offer in the quest for finding unity in diversity without sacrificing the latter.

III. CONSTITUTIONAL PROTECTION OF MINORITIES

The multi-party constitutional negotiating process began in February 1990. The negotiations included two phases, according to which an interim constitution would first be negotiated and implemented for a transitional period, with drafting of a new constitution undertaken by a democratically elected Constitutional Assembly after the first democratic elections in April 1994. The commitment of the negotiating parties to draft and adopt a new constitution for the country by a credible and properly mandated body was clear. This process, however, did not entirely satisfy minority groups. They feared that such a body might not satisfactorily address their anxieties and foil their participation in designing a constitutional framework for future governance of the country. Consequently, thirty-four Constitutional Principles were included in a Schedule to the Interim Constitution to provide a binding framework on the Constitutional Assembly for the drafting of the new Constitution.²⁰

As an additional protective measure, the Constitutional Court subjected the adoption of the final text to its certification and required that the new text comply with the Constitutional Principles. This process ended in December 1996, after the Court referred the text back to the Constitutional Assembly for amendments. The two constitutional texts, the thirty-four Constitutional Principles and the judgments of the Constitutional Court are all important in understanding the new constitutional framework and thinking behind the mechanisms for the protection of minority rights and interests. Hence, it is the main focus of the discussion below.

20. See S. AFR. CONST. (Act 200 of 1993) § 71, sched. 4.

A. Constitutional Principles

Since various aspects of the Constitutional Principles already found expression in the Interim Constitution, it is appropriate to start with the Principles and then follow with how they are realized in the different constitutional texts.

Without being overly technical, one may distinguish between principles that prohibit non-discrimination on the basis of culture, language, origin, religion and persuasion, versus principles that allow for special measures aiming at the preservation of cultural or other identities on the other. The first category secures equal treatment and ensures that no one is prevented from exercising their rights on the basis of a group association that might differ from the political majority. Constitutional Principles III and IV, as well as section 8 of the Interim Constitution echo these sentiments in outlawing unequal treatment or discrimination on a variety of grounds.²¹

Of the second category, Constitutional Principles create different possibilities. First, Constitutional Principle XI makes it incumbent on the Constitution to recognize and protect the diversity of language and culture, and to encourage conditions for their promotion.²² This principle is artfully worded. It does not allow for an interpretation that is conclusive enough to place a positive duty on the state to create the conditions necessary for the promotion of different cultures and languages. It only requires that the state should bestow its blessings on attempts to create favorable conditions for the promotion of cultural diversity. In this manner, the public realm relegates cultural concerns to the private sphere, an issue that will again be addressed later in the discussion.

Second, provisions are made for two forms of self-determination. One is cultural self-determination. Constitutional Principle XII provides for this by allowing "collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations on the basis of non-discrimination and free association."²³ Constitutional Principle XXXIV, on the other hand, opens the way for

21. See *id.* § 8 sched. 4, const. princs. III-IV.

22. See *id.* sched. 4, const. princ. XI.

23. *Id.* sched. 4, const. princ. XII.

political self-determination "by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way."²⁴

On the eve of the April 1994 elections, a historic accord was signed between the ANC, the then South African Government, and the conservative Freedom Front.²⁵ The immediate consequence of this accord was last minute amendments to the Interim Constitution, such as Constitutional Principle XXXIV.²⁶ Thus, the self-determination aspirations of certain communities could remain on the political and constitutional agenda. Notably, the parties to the Accord agreed on a concept of self-determination that was vastly different from what was previously a caricature of the concept under apartheid rule. This new tone was already present in a December 1993 Memorandum of Agreement between the Afrikaner Volksfront, the forerunner of the Freedom Front, and the ANC. Both parties committed themselves to the development of a non-racial democracy.²⁷ The Memorandum, included in the Accord, also endorsed the "universally accepted" concept of self-determination "expressed in the Charter of the United Nations which serves the purpose of peaceful co-operation between peoples on the basis of mutual respect and recognition of fundamental freedoms and basic human rights for all."²⁸

By making Charter law the point of reference, the implementation of Constitutional Principle XXXIV will have to be considered against the background of international law developments. Furthermore, section 231(4) of the Interim Constitution and section 232 of the 1996 Constitution make customary international law an integral part of South African law.²⁹ Recently, the South

24. *Id.* sched. 4, const. princ. XXXIV, ¶ 1. It is important to read this provision while considering the historical developments that caused its inclusion in schedule 4 of the Interim Constitution.

25. Accord on Afrikaner Self-Determination Between the Freedom Front, the African National Congress and the South African Government/National Party, Apr. 23, 1994 [hereinafter Accord on Afrikaner Self-Determination].

26. See S. AFR. CONST. (Act 200 of 1993) sched. 4, const. princ. XXXIV.

27. See Accord on Afrikaner Self-Determination, *supra* note 25.

28. *Id.* at 8, 13-14.

29. See S. AFR. CONST. (Act 200 of 1993) § 231(4); S. AFR. CONST. (Act 108 of 1996)

African government became a signatory to the International Covenant on Civil and Political Rights (1966).³⁰ This new framework and the developments that have taken place within it over recent years, open up various possibilities for minority rights protection.

This remains one of the unresolved issues in South Africa's constitutional and political development. The other unresolved issue is the accommodation of the aspirations of the traditionalists among the Zulu nation. During the sensitive negotiations preceding the April 1994 elections, self-determination for the Zulus became a volatile rallying point. Using historic title to ancestral land and the right of the Zulu Monarchy to have a separate existence, Zulu nationalism was effectively mobilized. This resulted in certain last-minute amendments to the draft text of the Interim Constitution in order to accommodate the aspirations of the traditionalists. Constitutional Principle XIII, for instance, makes it obligatory that the Constitution provide for the recognition and protection of the institution, status and role of traditional leadership in accordance with indigenous law.³¹ Certain provisions in the Interim Constitution itself were amended to give effect to these principles.

B. Interim Constitution

In culturally diverse societies, equal treatment, political participation and the preservation of cultural identity are crucial ingredients of legal and constitutional mechanisms for the protection of minorities and form the basis for further development of such mechanisms. These minimum requirements have become common knowledge in all the major international instruments on the subject.³²

1. Equal treatment

Under normal circumstances, equal treatment or non-

§ 232.

30. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

31. See S. AFR. CONST. (Act 200 of 1993) sched. 4, const. princ. XIII.

32. See *Report on Equality and Non-Discrimination: Minority Rights*, Council of Europe (90) 6 (1990); H.A. Strydom, *Views on the International Measures for the Protection of Minorities*, S. AFR. Y.B. INT'L L. 134, 137 (1992/93).

discrimination is the least problematic of these requirements. It becomes problematic when historical circumstances sanction exclusions to the general rule. This is the case with section 8(3) of the Interim Constitution, which allows for unequal treatment when measures are taken to advance persons or groups disadvantaged by unfair discrimination in the past.³³ In principle, no objection should arise to the inclusion of measures which aim at addressing injustices of the past. The problem arises, however, when no clear policy guidelines on the implementation of remedial measures exist. Moreover, when the group singled out for favorable treatment already stands in the majority and, thus, in a favorable position, where does it leave minority communities and their legitimate and equitable entitlements to a share in the spoils of the public realm? It is no solution to appease them with the opportunities of the private sphere.

2. Language and Culture

On the point of special measures for the protection of cultural diversity, one can refer to several provisions in the Interim Constitution. Section 3 lists eleven languages and classifies all of them as official languages of the Republic at the national level.³⁴ The section also obligates the government to create conditions for their development and for the promotion of their equal use and enjoyment. In dealings with public administration at the national level, a person is entitled to use and be addressed in an official language of his or her choice, when practicable.³⁵ This provision, in conjunction with section 31, which forms part of the Bill of Rights in Chapter 3 of the Interim Constitution, and states that "every person shall have the right to use the language and to participate in the cultural life of his or her choice."³⁶ In legal proceedings, a party to litigation, an accused person or a witness is entitled to use the official language of their choice and may require that the pro-

33. This is the so-called affirmative action clause, which Parliament re-enacted in the 1996 Constitution. See S. AFR. CONST. (Act 108 of 1996) § 9(2).

34. See S. AFR. CONST. (Act 200 of 1993) § 3.

35. See *id.* § 3(6).

36. See *id.* § 31.

ceedings be interpreted in a language understood by them.³⁷

At the regional (provincial) level, language policy is provided for by section 3(4) and (5).³⁸ A provincial legislature may, for instance, declare any of the official languages as the official language of the province.³⁹ Certain safeguards, however, apply in such instances. Two-thirds of its members must approve the legislature's resolution, and no language right or status of an official language existing at the time of the commencement of the Constitution may be diminished.⁴⁰ The purpose of this provision is to protect the pre-constitutional position of the use of the prior official languages Afrikaans, English and perhaps also an indigenous language in certain areas.

Section 3(9) protects languages and contains a list of principles, legislation and government policy and practice in regard to the use of language.⁴¹ Included in the list are the following:

1. no language may be used for the purpose of exploitation, domination or division;
2. multi-lingualism shall be promoted and translation facilities provided; and
3. respect for languages other than the official languages must be fostered and their use encouraged.⁴²

Another significant step is the provision in section 3(10) for the establishment of an independent Pan South African Language Board.⁴³ This Board, subsequently established by Parliamentary legislation,⁴⁴ is empowered by the Interim Constitution to promote respect for the principles set out in section 3(9), to further the development of the official languages, and to promote respect for other languages used by communities in South Africa. The Board also has an advisory function with regard to legislation on language issues.

37. See S. AFR. CONST. (Act 200 of 1993) § 107. See also *id.* § 25(1)(a), (2)(a), (3)(i) (dealing specifically with the language rights of detained, arrested and accused persons).

38. See *id.* § 3(4), (5).

39. See *id.* § 5.

40. *Id.*

41. See S. AFR. CONST. (Act 200 of 1993) § 3(9).

42. *Id.*

43. See *id.* § 3(10).

44. See Pan South African Language Board Act, 1995, 59.

3. Religion, Belief and Opinion

Section 14 of the Interim Constitution guarantees the right to freedom of conscience, religious thought, belief and opinion, which includes academic freedom in institutions of higher learning.⁴⁵ The section further allows for some form of derogation from this general right, which may be significant for minority communities. In the first instance, state or state-aided institutions may allow for religious observances. Such observances must take place in accordance with rules established by an appropriate authority. They must be conducted on an equitable basis and attendance must be free and voluntary.

This derogation has a particular relevance for state schools. The section indicates a bias in favor of religious observances at state schools and demonstrates an unwillingness to adopt the American approach of strict state neutrality in religious matters. The requirements of equity and free attendance are concessions to the libertarians, who expressed disquiet at the inclusion of the provision. These concessions, however, did not dispel their apprehension that, in practice, equity and voluntariness might prove difficult and even impossible to achieve.⁴⁶ Although this might be true, the solution is sensible and appropriate for a society in which religion still plays a significant role and the educational system still struggles to gain respect and legitimacy.

Section 14(3) permits legislation regarding the consequences of particular religious faiths, at least as far as marriage, personal and family law are concerned. It creates an opportunity to validate a system of personal and family law, as well as the recognition of marriages conducted under a system of religious law potentially different from the official or mainstream practice.⁴⁷ This section addresses past injustices resulting from the non-recognition of marriages conducted in accordance with certain religious beliefs and practices.

45. See S. AFR. CONST. (Act 108 of 1996) § 15 (containing similar provisions).

46. Cf. H. CORDER & L. DU PLESSIS, *UNDERSTANDING SOUTH AFRICA'S BILL OF RIGHTS* 157 (1994).

47. See S. AFR. CONST. (Act 200 of 1993) § 14(3).

What if practices under a system of religious laws infringe upon other provisions in the Bill of Rights, such as gender equality? One must keep in mind that section 35(1) of Chapter 3 on the Bill of Rights obliges the courts to promote the values of an open and democratic society based on freedom and equality when interpreting the chapter. Section 35(3) makes the interpretation of all law, including the application and development of the common law and customary law, subject to the spirit, purport and object of Chapter 3.⁴⁸ Additionally, section 33 of the Interim Constitution contains the limitation provisions.⁴⁹ It provides that any limitation on a right entrenched in Chapter 3 shall be permissible only to the extent that it is reasonable, justifiable in an open and democratic society, does not negate the essential content of a right, and is also necessary in certain specified instances. Thus, legislation that recognizes a system of religious practices, or a law which infringes upon other rights in Chapter 3, will have to comply with the requirements of section 33.⁵⁰

4. Education

Education has been and continues to be one of the most contested and politicized issues in South Africa. The social engineering and experimentation that education was subjected to under apartheid rule is partly responsible for the intensity of this debate. In post-apartheid South Africa, education has once again fallen prey to the manipulating and exploitative strategies of political opportunists. As a result, educational issues are a highly divisive influence and are easily instrumentalized in pursuit of cheap political gains.

Even under normal circumstances, finding a solution that effectively caters to culturally diverse needs is fraught with controversies. South Africa, however, suffers under the additional weight of past disadvantages demanding correction, as well as the constraints of limited resources and a struggling economy. The promise of equal access to educational institutions in section 32(a) of the Interim Constitution, unsupported by adequate financial

48. See *id.* § 35(3).

49. See *id.* § 33.

50. See also DION BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION 27 (1994).

backing⁵¹ and educational facilities has left many disillusioned and frustrated.

The education clause gives little solace to cultural groups aspiring to find an appreciative environment in state educational institutions. Their sole consolation is that instruction in the language of one's choice is guaranteed under section 32(b), so long as it remains reasonably practicable. Education based on a common culture, language or religion is relegated to private educational institutions.⁵² Yet, even this right is subject to the requirement that it must be practicable to establish such institutions.

Section 32 follows conventional wisdom, emphatically demonstrated by the judgment of the Constitutional Court in the *School Education Bill* case.⁵³ The case concerns a dispute in the Gauteng Provincial Legislature concerning the constitutionality of certain provisions of a bill dealing with language and religious issues in schools.⁵⁴ The bill *inter alia* prohibited language competence testing as a requirement for admission to a public school and set certain guidelines for the religious policy of public schools.⁵⁵ The bill also affects private schools supported by government subsidies. In short, the guidelines aimed at developing respect for South Africa's diverse cultural and religious traditions. They asserted the right that attendance at religious observances at the schools in question must be free and voluntary. The bill further empowered the responsible member of the Provincial Executive Council to direct, after consultation with the governing body of a school, that the religious policy of a school not complying with the guidelines be reformulated.⁵⁶

A petition by members of the Legislature reserved the matter to the Constitutional Court to resolve the dispute on the bill's

51. The government introduced a bursary and loan scheme for prospective university students which has proved to be wholly inadequate.

52. See *id.* § 32(c).

53. See *In re: The School Education Bill, 1996* (4) BCLR 537 (CC).

54. See *id.*

55. See *id.*

56. See *id.*

compliance with section 32 of the Interim Constitution.⁵⁷ Relevant to the present discussion is the petitioners' contention that section 32(c) created a positive obligation on the state to establish, where practicable, schools based on a common culture, language or religion.⁵⁸ The Court, in dismissing this somewhat contrived argument, correctly concluded that the language of section 32(c) does not support a conclusion that the state carries such an obligation. The section does, however, provide that "every person shall have the right to establish such educational institutions."⁵⁹ It provides a defensive right to a person who seeks to establish such educational institutions and it protects that right from invasion by the State, without conferring on the State an obligation to establish such educational institutions. For Judge Sachs, section 32(c) created "a constitutionally guaranteed space for private individuals to set up and maintain their own schools if they feel that their special cultural, language or religious needs are not being sufficiently catered for in the State system."⁶⁰

As evidenced by the judgment, there are many examples supporting this construction of a state's obligation in culturally diverse societies. This orthodox wisdom stems essentially from a liberalist view of the state adopting equality in dignity, rights and entitlements as the hegemonic identity,⁶¹ while relegating peculiar needs and entitlements to the private sphere. The state's obligation begins and ends with demonstrating a liberal tolerance towards the collective goals and aspirations of certain cultural communities. Whether this model is appropriate for a diverse society, such as the South African one, remains unanswered.

In conclusion, some arguments raised by the Court deserve further attention because of their underlying assumptions, rather than their bearing on section 32(c). For instance, the issue of educational equality and access to educational institutions is prevalent, either expressly or impliedly throughout the judgment. It there-

57. See S. AFR. CONST. (Act 200 of 1993) § 32.

58. See *id.* § 32(c).

59. *In re: The School Education Bill*, 1996 (4) BCLR 537, 545 (CC).

60. *Id.* at 572.

61. *Cf. id.* at 560 (remark of Sachs J) ("We are further enjoined to interpret the whole of Chapter 3, including section 32, in a way which promotes the values of an open and democratic society based on freedom and equality. The theme of diversity has markedly less constitutional pungency.").

fore becomes crucial to establish how the court understands and employs equality.

Is equality merely understood as socio-economic equality? In the judgment, there are several references to "affluent schools and their defensive postures" or schools that were "well endowed because of past state support."⁶² Should this bias indicate an understanding of equality as socio-economic equality, the equal treatment of groups in the education clause will always be hermetically frozen in a meaning dominated by economic considerations. Under such a reductionist scheme the concept of equality is unlikely to develop the breadth necessary to accommodate non-economical concerns and aspirations. What has affluence, after all, to do with the protection of a right?

In his analysis of international law developments in culturally specific education and its relation to state obligations, Judge Sachs concluded:

[T]he central theme that runs through the development of international human rights law in relation to the protection of minorities, is that of preventing discrimination against disadvantaged and marginalized groups, guaranteeing them full and factual equality and providing for remedial action to deal with past discrimination. . . . The weight of international law should be in favor of the dominated and not the dominating minorities.⁶³

By implication, international law does not offer much protection to the white majority because of their privileged and dominant position in the past. In labeling groups as dominant or non-dominant, and advantaged or disadvantaged, one detects an economic paradigm at work. There exists, however, a more fundamental problem with Judge Sach's argument, which relies heavily upon the dated works of Capotorti on minority rights in international law.

In relation to the state, a cultural or ethnic group is neither a minority nor a majority. As equal partners in rights, all cultural

62. *Id.* at 560 para. 52, 574-77.

63. *Id.* at 577.

groups irrespective of their numerical, linguistic, religious, economic or other differences, have rights to equal treatment by the state in accordance with the demands of justice, of which the state is essentially an agent. This ideal vanishes once the state is perceived to be the embodiment of a specific societal group.

Thus, from a juridical and state theory perspective, Capotorti's categorical statement that dominant minority groups do not need protection⁶⁴ lacks foundation. The republican idea of the modern state refers to a juridically qualified, communal bond between citizens and government that transcends all non-juridically qualified social relations. Thus, the numerical, political, economic or cultural dominance of one group or another is irrelevant for the protection of rights. The integration of rights and interests in the state by public law is inclusive, neither excluding nor favoring a particular group. After all, that is why the modern state is referred as a *res publica*, a public matter. Significantly, the Parliamentary Assembly of the Council of Europe stated the following in a recommendation on the rights of minorities:

In a democratic state there can be no second class citizens: citizenship is the same for all. . . . Within this common citizenship, however, citizens who share specific characteristics . . . with others may wish to be granted and guaranteed the possibility of expressing them.⁶⁵

Once we link the need for protection to extraneous considerations such as dominance or non-dominance, this equal and common citizenship ideal is refuted. From a legal rights perspective, the sole question is whether a group has a right or interest which inherently qualifies for protection. Nonetheless, the manner in which the state provides protection for certain groups may of course differ, despite the principle of equity receiving due recognition.

64. FRANCESCO CAPOTORTI, STUDY ON THE RIGHT OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES 96 (1979).

65. *Report on the Rights of Minorities*, Eur. Parl. Ass. Deb., 43rd Sess., Doc. No. 6556 (1992).

5. Political Participation, Legal Intervention and Provincial Powers

Cultural communities and their members may participate in the state decision-making process to influence policy and legislation, which may infringe on their rights through political mechanisms, or they may seek judicial intervention. To illustrate, Constitutional Principle XIV of Schedule 4 to the Interim Constitution provides for minority group participation in the legislative process via political parties. The Interim Constitution has given effect to this process by providing for a government of national unity during the transition phase.⁶⁶ It allocates Cabinet portfolios to parties holding a certain percentage of seats in the National Assembly⁶⁷ and supplies a Cabinet decision-making procedure giving consideration to consensus-seeking, rather than resorting to majority decisions.⁶⁸ Similar provisions also exist with regard to provincial governments.⁶⁹ The 1996 Constitution makes it incumbent that national and provincial legislative bodies provide for participation by minority parties in their proceedings.⁷⁰

The Constitutional Court may intervene in the event of a dispute over the constitutionality of any bill before Parliament or a Provincial Legislature. In such instances, the Speaker of the National Assembly or of a provincial legislature must refer the dispute to the Constitutional Court, upon the request of at least one-third of the legislative body.⁷¹ This effectively suspends the legislative process pending the outcome of the Court's judgment and creates an opportunity to effect amendments to the bill should it become necessary. This mechanism has been retained in the 1996 Constitution with only one minor difference. In the case of a re-

66. See S. AFR. CONST. (Act 200 of 1993) sched. 4, const. princ. XIV.

67. See *id.* § 88(2).

68. See *id.* § 89(2).

69. See *id.* § 149(2), (5).

70. See S. AFR. CONST. (Act 108 of 1996) §§ 57(2)(b), 70(2)(c), 116(2)(b).

71. See S. AFR. CONST. (Act 200 of 1993) § 98(2)(d), (9). This procedure was followed in the *Education Bill* case, *supra* note 53. See also *In re: The National Education Policy Bill No. 83 of 1995, 1996 (4) BCLR 518 (CC)*.

ferral by the provincial legislature, the supporting vote has been lowered to at least twenty percent of the members.⁷²

Lastly, cultural communities may be protected through the constitution-making power granted to the provinces through section 160 of the Interim Constitution. This section authorizes provinces to adopt their own constitutions, provided that their provisions are consistent with those of the national Constitution.⁷³ In the 1996 Constitution, this matter is regulated by sections 142 and 143.⁷⁴

Since provinces derive their powers from the national Constitution they are bound by its scope. This is illustrated by the circumscription of functional areas in the national Constitution within which provinces may exercise legislative competence.⁷⁵ This power runs concurrent with that of the national legislature to legislate on matters falling within the functional areas of the provinces. In certain instances, national legislation will override provincial legislation.⁷⁶ Accordingly, a provincial constitution may only regulate matters that fall within the functional areas and operate consistently with the national Constitution.⁷⁷ So far, only the province of KwaZulu-Natal has embarked on this route, albeit unsuccessfully.⁷⁸

Of the functional areas assigned to provinces, only the following may be relevant for the protection of cultural communities: cultural affairs, education, language policy, traditional authorities and indigenous law. Because the regulation of these matters by a province must be certified as consistent with the national Constitution, leeway for the provinces is limited, especially given the extensive and detailed regulation by the Interim Constitution and its successor. As the Constitutional Court's rejection of the

72. See S. AFR. CONST. (Act 108 of 1996) §§ 80, 122.

73. See S. AFR. CONST. (Act 200 of 1993) § 160.

74. See S. AFR. CONST. (Act 108 of 1996) §§ 142, 143.

75. See S. AFR. CONST. (Act 200 of 1993) § 126, sched. 6.

76. See *id.* § 126(2)(A), (3).

77. See *id.* § 160(4).

78. See Certification of the Constitution of KwaZulu-Natal, CCT 15/96. The KwaZulu-Natal provincial constitution did not pass certification by the Constitutional Court in September 1996 on the grounds that it assumed and assigned powers and functions to the province that fall outside those granted by schedule 6 of the Interim Constitution. The province of the Western Cape is currently involved in the drafting of a provincial constitution.

KwaZulu-Natal provincial constitution under the Interim Constitution indicates, the drafting problems for provinces are considerable.⁷⁹ The source of this dilemma is found in the drafting history of the Interim Constitution and in the attempts to find some common ground between the centralists and the federalists. Through the incorporation of a maze of conditional clauses, concessions made during the compromise process eventually eroded the power of the provinces.

6. Accommodation of Self-Determination and Aspirations

In Part A, this article described how the Constitutional Principles were amended to accommodate the aspirations of both conservatives and traditionalists. These aspirations also influenced certain provisions in the Interim Constitution. As a result both groups were provided with some constitutional protection, even if the amendments only succeeded in keeping the debate alive and prevented their aspirations from being completely overshadowed by the liberalist tenor of the new South Africa.

To accommodate the traditionalists amongst the Zulu nation, an option was created to provide for the institution, role, authority and status of traditional leadership. This also secured the position of the Zulu Monarch through provincial constitutional mechanisms.⁸⁰ The status of traditional authorities is continued in section 181(1), which provides that, a traditional authority which observes a system of indigenous law, recognized by law prior to the Interim Constitution, shall continue as such.⁸¹ Traditional leaders observing a system of indigenous law and residing on land within the jurisdiction of local government become *ex officio* members of a local government and are eligible for election to any such local government position.⁸²

Traditional leaders are not elected, this arrangement is clearly a derogation from the principle that "there shall be democratic

79. See *id.*

80. See S. AFR. CONST. (Act 200 of 1993) § 160(3)(b).

81. See *id.* § 181(1).

82. See *id.* § 182.

representation at all levels of government," as proclaimed by Constitutional Principle XVII.⁸³ This Principle specifically, however, allows for such a derogation in the case of traditional authorities. In traditional communities, traditional authorities function on the local government level and usually engage in matters which fall under local government jurisdiction. These mechanisms allow traditional leaders to represent traditional interests and aspirations in local government structures, and then facilitate cooperation between official local authorities and traditional authorities on matters of mutual concern.

On the provincial level, the Interim Constitution through provincial legislation provides for establishment of a Provincial House of Traditional Leaders.⁸⁴ The function of the House is two-fold: (1) to advise the provincial government regarding matters relating to traditional authorities, indigenous law, or the traditions and customs of traditional communities in the province; and (2) to comment on provincial bills pertaining to traditional authorities, indigenous law, traditions and customs before they are enacted into law. On the national level the Interim Constitution establishes a provision for the creation of a Council of Traditional Leaders to address national matters pertaining to traditional authorities.⁸⁵ It is clear that on the provincial and national levels the representation of traditional authorities is limited to advisory powers.

For conservatives, the process created an opportunity to pursue their aspirations for constitutional self-determination. Unlike the case of Zulu self-determination, which is more culturally inclined, the white conservative groups envisaged a territorially demarcated entity within which some form of political autonomy, if not independence, could be attained as the culmination of their self-determination aspirations. This long-term goal did not preclude other options or intermediate steps, and the last-minute amendments to the Interim Constitution served as a forum for debate, research and feasibility studies on the various possibilities.

The term "Volkstaat Council" which was chosen for this fo-

83. See *id.* const. princ. XVII.

84. See *id.* § 183.

85. See *id.* § 184.

rum⁸⁶ already incorporates the notion of an independent state and reflects the ultimate aspirations of at least certain elements in conservative politics. The powers and functions of the Council are advisory in nature and it purports to "gather, process and make available information with regard to possible boundaries, powers and functions and legislative, executive and other structures of such a Volkstaat, its suggested relationship with government at national and provincial level, and any other relevant matter."⁸⁷ Thus, the Council must make recommendations to government on the implementation and different forms of self-determination considered by the Council. The Council, inaugurated in June 1994, has yet to develop concrete proposals and its future under the 1996 Constitution is uncertain.

As illustrated, both groups have struggled for the realization of their aspirations in an unfavorable and unstable environment. South African politics might be free from the constraints of the past, but it has yet to move beyond its reactionary phase. Consequently, those who do not want to pronounce the post-apartheid virtuous shibboleth are suspiciously and begrudgingly met with concessions, and run the risk of becoming entangled in a political game of either marginalization or co-option. Internal dissent among the protagonists of self-determination, in either form, further adds to the absence of consolidated positions and claims, and creates fertile opportunity for exploitation by rival forces by manipulating the discourse.

C. The 1996 Constitution

On February 4, 1997, South Africa's final or new Constitution, as it is commonly referred to, came into effect. This Constitution marks the culmination of the country's move towards a constitutional dispensation that could provide the foundation "for a democratic and open society in which government is based on the will of

86. *See id.* § 184(A). This section and the one following constitute a new chapter, Chapter 11A of the Interim Constitution, and was inserted by section 9 of Act 2 of 1994.

87. *See id.* § 184(1)(a).

the people and every citizen is equally protected by the law.”⁸⁸

1. Language and Culture

The provision on the status of languages⁸⁹ does not alphabetically order the eleven official languages as in the Interim Constitution. Instead, the languages are listed according to usage, starting with the language lowest on the numerical ladder. The purpose of the structure is to change the order preference in a deliberate attempt to give textual prominence to languages lacking widespread usage.

Two other notable changes were effected by the new provision. The Interim Constitution embodied the outspoken philosophy that all eleven languages listed in section 3 of the Constitution should enjoy the status of official language at the national level.⁹⁰ It also urged the government to create conditions for their *equal* use and enjoyment. This aspiration is somewhat compromised in the new Constitution in various ways.

First, indigenous languages are singled out by the state for “advancement and status elevation” by reason of their historically diminished use and status.⁹¹ This implies a different approach than advocating “equal use and enjoyment.” Second, according to the new Constitution, instead of “equal use and enjoyment,” all official languages must enjoy “parity of esteem and must be treated equitably,” subject to the state’s obligation with regard to indigenous languages.⁹² Third, the choice of official language by different levels of government is now subject to a variety of considerations not mentioned in the Interim Constitution, such as usage, practicality, expense, regional circumstances, and the balance of the needs and preferences of the population.⁹³ The changes in the new Constitution are probably the result of a more sober assessment of the financial and practical implications of the Interim

88. S. AFR. CONST. (Act 108 of 1996) pmbl. This is certainly not the occasion for an extensive analysis of the differences between the Interim Constitution and the new Constitution. Many differences between the two are merely variations in semantics and textual construction. Thus, the discussion is limited to more substantial differences.

89. See *id.* § 6(1).

90. See S. AFR. CONST. (Act 200 of 1993) § 3.

91. See *id.* § 6(2).

92. See *id.* § 6(4).

93. See *id.* § 6(3).

Constitution's post-apartheid language policy, which was somewhat of an over-reaction against the marginalization of indigenous languages under apartheid.

The new language provision contains no reference to the principles listed in section 3(9) of the Interim Constitution, which had the purpose of guiding government legislation and policy regarding the use of the official languages. While one or two of those principles might have become obsolete in light of the new approach to the use of official languages, others, like the ones mentioned above in the discussion of the Interim Constitution, can hardly be devoid of any significance for the future development of a South African language policy.

The provision on the Pan South African Language Board has been amended to include a specific reference to the Khoi, Nama and San languages, as well as sign language, in the list of languages the Board is called upon to promote and develop.⁹⁴

With regard to culture, the Bill of Rights contains a new section on cultural, religious and linguistic communities⁹⁵ influenced by article 27 of the International Covenant on Civil and Political Rights. The relevant portion reads as follows:

31 (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right with other members of that community

(a) to enjoy their culture, practice their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with the Bill of Rights.⁹⁶

The first part of this provision has the individualistic ring of article 27 and, like the latter, will probably be the subject-matter

94. See *id.* § 6(5). The other languages falling into this category are German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu, Urdu, Arabic, Hebrew, Sanskrit, and other languages used for religious purposes.

95. See *id.* at ch. II, § 31. The Bill of Rights is contained in Chapter 2 of the 1996 Constitution.

96. *Id.*

of endless debates on whether the rights contained in the section are conferred on individuals or groups. For present purposes, there is no sense in attempting even a few passing remarks with regard to that debate. Two other matters, though, deserve further attention.

The first one relates to the provision in section 31(1)(b) which, *inter alia*, establishes a right to maintain cultural, religious and linguistic associations. This raises some interesting questions. First, will an association be entitled to limit or even exclude certain categories of persons based on an argument that such steps are vital to maintaining that particular association? Additionally, will it be regarded as fair discrimination and thus not outlawed by section 9, which contains the equal treatment clause? This is particularly relevant since the new Constitution, unlike the Interim Constitution, may also directly apply to relationships between individuals on what is popularly called the horizontal level.⁹⁷ Secondly, will such a practice of limiting or excluding potential members pass the consistency test set by section 31(2)? Moreover, is it unrealistic to envisage the operation of private educational institutions under similar conditions and on the premise that the cultural ethos of an educational institution forms a crucial element in the conservation and transfer of the cultural life of a community?

I raise these questions because an aspect of the debate on protection of institutions for cultural communities that is normally an anathema to the individualist approach to human rights protection has been largely ignored. Namely, may an institution claim constitutional protection for its cultural ethos or underlying value system? If so, can it exclude or limit, on that basis, certain categories of persons from membership or expect prospective members to respect and abide by the value system underscoring the cultural ethos of that institution? These are familiar issues in the current wide-spread debate on criticism of the orthodox liberal approach to such concerns, and in the course of further discussion they will be raised again.

The second matter concerns the provision on the Commission for the Promotion and Protection of the Rights of Cultural, Relig-

97. See *id.* § 8(2).

ious and Linguistic Communities.⁹⁸ This provision forms part of Chapter 9 which regulates "State Institutions Supporting Constitutional Democracy" and includes provisions on institutions such as the Public Protector, the Gender Commission, and the Human Rights Commission. It was a concession to minority parties to break an impasse in the negotiations hours before the deadline for the drafting of the new Constitution was to expire. Its aim is to provide a forum for expressing the concerns and aspirations of cultural and other communities.

The primary functions entrusted to the Commission are:

1. to promote respect for the rights of cultural, religious and linguistic communities;
2. to promote and develop peace, friendship, humanity, tolerance and national unity among the different communities on the basis of equality, non-discrimination and free association; and
3. to recommend the establishment or recognition of a cultural or other council or councils for a community or communities in South Africa.

The Commission, which must be broadly representative of the main cultural, religious and linguistic communities in South Africa,⁹⁹ is empowered to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of the respective communities.¹⁰⁰ Like the other Chapter 9 institutions, the Commission is instructed to be independent, subject only to the Constitution and the law, to act impartially and to perform its functions without fear, favor or prejudice.¹⁰¹ The Commission is accountable to the National Assembly and must report on its activities at least once a year.¹⁰²

In September 1996, the Institute for a Democratic Alternative for South Africa (IDASA) hosted a conference in Cape Town on

98. *See id.* at ch. IX, § 185.

99. *See id.* § 186(2).

100. *See id.* at ch. IX, § 185(2).

101. *See id.* § 181(2).

102. *See id.* § 181(5).

matters relating to the Commission. On this occasion, prominent ANC members of Parliament aired their views on the political imperatives behind the creation of the Commission and on what they perceived to be the intended aim and function of the Commission.¹⁰³ From their observations, one may arrive at an understanding of the rationale behind such a mechanism and how this rationale may impact on future developments.

In his contribution the Minister of Constitutional Affairs explained that the "drafters of the new constitutional text have acknowledged the fact that the transition process to a full democratic system in South Africa is to a great extent dependent on the skillful management of historically founded perceptions regarding different communities."¹⁰⁴ While non-racialism is the "core ideology of the new South African state," the challenge is "to demonstrate that within a culture of non-racialism, various cultural, religious and linguistic communities can prosper and jointly provide content" to the new South African society.¹⁰⁵ Underlying the establishment of the Commission is the "objective of nation building" and in this process "respect for the rights of cultural, religious and linguistic communities must be ensured, and peace, friendship, humanity, tolerance and national unity amongst the different communities must be promoted and developed."¹⁰⁶

Regarding other contributions, three issues deserve attention. First, the creation of a national identity, a challenge in the transitional phase, to "imply a sense of political community, some common institutions, and a single code of rights and duties for all members of the community."¹⁰⁷ Second, this end must be borne in mind by the Commission who must not allow an "unbridled expression of separatist cultural diversity that will corrode a growing sense of South Africanness."¹⁰⁸ Third, it was decided that the time

103. See Valli Moosa, Minister of Const. Aff., Legislation and the Anticipated Political Process (unpublished manuscript, on file with the author); Kader Asmal, Minister of Water Affairs, Constitutional Background and Political Imperatives Surrounding the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (unpublished manuscript, on file with the author).

104. Moosa, *supra* note 103.

105. *Id.* at 2.

106. *Id.* at 3.

107. See Asmal, *supra* note 103, at 3.

108. *Id.* at 6.

had come to move away from the denouncement of group rights and to "understand from a progressive position that there are certain rights which can only be exercised as group or collective rights. For the effective protection of cultural, linguistic and religious rights, they can only be exercised by individuals as part of a collective."¹⁰⁹ This latter assumption was explained as a "paradigm shift" and a necessary part of the recognition of the reality of a divided country in which a number of cultural, linguistic or religious groups feel threatened by a perceived homogenous majority.¹¹⁰ Consequently, the "creation of the Commission is an attempt to deal with the issue of minority rights creatively."¹¹¹

These sentiments, all appropriate for the issue under discussion, have a familiar ring. In the 1980s, the former South African government mandated the South African Law Commission to conduct research into and compile a report on the introduction of a Bill of Rights for South Africa. This report was known as Project 25: Group and Human Rights, and was published in March 1989. Subsequently, the Law Commission published a lengthy Interim Report and a summary of the latter, containing the most important conclusions and recommendations of the Law Commission on the issue of group and human rights. The following extracts are made from the summary report:

The Law Commission is of the opinion that a sympathetic vision of a future South Africa amongst all South Africans is only possible if all needs are identified and given effect to in a practical, non-dogmatic manner. An attempt must be made to create mechanisms for the protection of rights, even if it would mean that new remedies and new mechanisms must be discovered;

There are still many South Africans who sought protection for their rights in what is interchangeably referred to as group rights, minority rights or community rights. This is understandable in view of the deep divisions in society as a result of the policy of apartheid and the concomitant

109. *Id.* at 7.

110. *Id.*

111. *Id.*

feelings of suspicion and distrust. The basic question is whether South Africans are really one nation, or just a multiplicity of nations that occupy the same territory, held together by a loose and competitive relationship;

From the reaction received on Project 25 and from observing daily affairs in our country, it is clear that group conflict will not be solved by ignoring the existence of groups and the conflict between them. The answer is not forced assimilation, but a balanced accommodation within a real and just democracy.¹¹²

These episodes in the evolving South African constitutional debate demonstrate a convergence of formerly disparate views to a point where constitutional recognition of unity in diversity offers the best practical solution for this intermediate phase in the country's political and constitutional development. To push the matter further would be to bring the delicate balance accomplished after years of arduous negotiations under tremendous strain. Equally important, however, will be the realization and further development of the constitutional principles through state policy and practice which, if wrongly conceived and applied, can seriously undermine trust in the existing scheme of constitutional protection.

2. Education

The new provision on education¹¹³ contains a further controversial concession to accommodate the concerns of certain communities with regard to the language of instruction. In order to ensure effective implementation of the right to receive instruction in the language of one's choice, the state may now consider "all reasonable educational alternatives, including single medium institutions, subject to considerations of equity, practicability and the need to redress the results of past racially discriminatory laws and practices."¹¹⁴ In its certification judgment, the Constitutional Court interpreted this provision as placing a positive duty on the state to implement language rights with regard to instruction in educational institutions, which the Court found did not exist under

112. *Summary of Interim Report on Group and Human Rights* (S. Afr. Law Commission), Project 58, Aug. 1991, at 16, 25-26. References are to the Afrikaans text. The extracts in the text above are free translations in summary form of the Afrikaans wording.

113. See S. AFR. CONST. (Act 108 of 1996) § 29.

114. See *id.* § 29(2).

the Interim Constitution.¹¹⁵

Single medium schools are now an option, but one that must be weighed against other possibilities. Discrimination in educational institutions on linguistic grounds is also allowed by article 2 of the 1960 UNESCO Convention against Discrimination in Education.¹¹⁶ In the South African context, demographics and population shifts will have a significant influence on the implementation of the new constitutional principles, and a policy of differential accommodation of different communities is not without merit. The complexity of the situation is illustrated by the major changes schools in rural locations have undergone since the demise of apartheid. In many instances, all-white schools changed overnight into all-black schools, forcing white parents to either set up alternative schools or send their children to urban areas to be accommodated in either mixed or predominantly white educational institutions. This in turn has led to a numerical overload at some institutions, and quite often in areas where the teacher/pupil ratio is already unhealthy. In the final analysis, putting the educational record straight in the South African context entails much more than remedying past injustices—the system is in need of a comprehensive overhaul.

3. Fate of Self-determination Under the 1996 Constitution

Under the 1996 Constitution the role of traditional leadership and all its relics in matters of governance will depend on the mercy of the national, provincial and local legislative authorities. These authorities no longer have any constitutional obligation¹¹⁷ to establish advisory bodies on traditional matters or accommodate traditional leaders in local government structures, as under the Interim Constitution.

The 1996 Constitution continues to recognize the role of traditional leadership according to customary law, subject to the Con-

115. Certification of the Constitution of the Republic of South Africa, 1996 23/96 52; see also *In re: The School Education Bill*, 1996 (4) BCLR 537, 572-73 (CC).

116. Adopted by the General Conference of UNESCO on December 14, 1960, UNESCO Convention against Discrimination in Education, art. 2 (1990).

117. See S. AFR. CONST. (Act 108 of 1996) § 212.

stitution. Furthermore, the Constitution requires courts to apply customary law where applicable, as long as it is not inconsistent with the Constitution or other legislation that deals with customary law.¹¹⁸ The Constitutional Court decided that these new provisions adequately comply with Constitutional Principle XIII.¹¹⁹ Whether these provisions offer less protection than the Interim Constitution is a matter falling outside the Court's certification mandate.

Under the new constitutional dispensation, the fate of traditional systems of authorities and governance is sealed. These systems will either be gradually phased out or become cultural theme parks. The underlying reason for this state of affairs transcends the current constitutional position. Ultimately, it is connected with modern progress from undifferentiated or closed systems to differentiated or open systems. The modern constitutional state cannot tolerate alternative systems of governance. Liberalism's homogenizing of the legal order excludes the accommodation of alternative, incommensurable legal systems on the state's territory. The Constitution has made a choice: customary traditions and law must adapt to the Constitution or die.¹²⁰

The regulation of cultural affairs and traditions seems to be the only role left to traditional authorities. Success in maintaining their current local government-like functions in rural areas is doubtful. The present mood is against non-elected officials and local government is one of the most contested areas in South African politics. Local governments are the entities closest to those individuals who control both the land and resources, through local government institutions in rural South Africa. In rural South Africa, those who control the land and the resources control the voters. This control is the underlying cause of the fierce battles over local government control between the ANC and the Zulu-dominated Inkatha Freedom Party in the province of KwaZulu-Natal.¹²¹ These battles have left many dead and countless more

118. See *id.* § 211.

119. See discussion *infra* Part III.B.

120. See S. AFR. CONST. (Act 108 of 1996) § 39(2), (3). Section 35(3) is the Interim Constitution's equivalent provision. See S. AFR. CONST. (Act 200 of 1993) § 35(3).

121. For a more detailed discussion of these issues see G. Houston & S. Fikeni, *Constitutional Development and the Issue of Traditional Leadership in Rural Local Government in South Africa* Seminar Report: Aspects of the Debate on the Draft of the New South

homeless.¹²²

On the white conservative front, the self-determination option in Constitutional Principle XXXIV has almost identical terms in the 1996 Constitution.¹²³ The importance accorded to this "notion," as the constitutional text refers to it, is clear from its position in the new Constitution: it falls under the sub-heading "other matters" in a chapter entitled "General Provisions." Coincidentally, this is where international law is located in both the Interim and 1996 Constitutions. During the negotiations all attempts to have self-determination included in the Bill of Rights, as a third generation right in accordance with international law, were unsuccessful. Fortunately for the conservatives, their Volkstaat Council has been given new life under the 1996 Constitution, but only until Parliament changes its mind.¹²⁴

IV. CONCLUSION AND FUTURE OPTIONS

Post-apartheid South Africa chose a constitutional model that is classically liberal. In keeping with modern trends and to accommodate the peculiar aspirations of certain communities, this model has been adjusted in two ways. First, constitutional space has been created for cultural, linguistic and religious communities to pursue certain goals without state interference. Second, the Constitution has not foreclosed the possibility of territorial self-determination for conservative groupings. This privatization of cultural affairs has certain benefits: it absolves the state from its responsibility to positively contribute to the realization of communal aspirations, and allows the state to uphold the image of a neutral public institution. What counts, nevertheless, for the liberal state are the rights and interests of the self-centered individual, not groups or affiliations.

African Constitution, Konrad Adenauer Foundation, 63 (Apr. 1996).

122. Importantly, the Inkatha Freedom Party chose not to participate in the proceedings of the Constitutional Assembly and hence in the drafting of the new Constitution. Some of the party's representatives in the provincial executive also indicated their refusal to swear allegiance to the new Constitution. See SUNDAY TIMES, Feb. 2, 1997 at 2.

123. See S. AFR. CONST. (Act 108 of 1996) § 235.

124. See S. AFR. CONST. (Act 108 of 1996) sched. 6, § 20(5).

In recent years, the liberal tradition has met with mounting pressure from feminists, cultural and ethnic minorities and critics of Eurocentrism. These groups want the modern constitutional state to recognize the special needs and interests of collective identities. Specifically, a mere tolerance of diverse identities and their accommodation in a constitutionally protected space is not enough. The state must demonstrate that it actually recognizes these identities for what they are, and in that process, abandon its neutral position to promote groups which give shape and meaning to the lives of their members. The arguments in favor of such an adjustment to the function of the liberal state have been eloquently put by many scholars over the last decade or more. Because some of my concluding suggestions are related to these sentiments, which are of particular relevance for the South African situation, I will refer to some of the contributions in this regard, albeit very briefly.

In his seminal work on the politics of recognition, Charles Taylor argues that the neutrality of the liberal state must be reconsidered in matters regarding collective goals. Providing space for cultural communities to pursue their own interests is not enough, rather, public policy should actively secure the future of cultural communities. This policy might even justify the revocation or restriction of certain privileges and immunities.¹²⁵

Taylor's kindred spirit, Michael Walzer, has made similar claims. Walzer warns that the real risk of the liberal free-rider society is that group dissolution and abandonment is inversely related to state intervention, to compensate for the failures of civil associations, ultimately threatening the stability of the central state itself. For "the more dissociated individuals are, the stronger the state is likely to be, since it will be the only or the most important social union."¹²⁶ According to Walzer, a correction of this outcome lies in a view of the state which is essentially liberal but prepared to give up its neutrality and endorse or sponsor activities that form and give shape to collective identities.

More recently, this debate was further enriched by the well-

125. See CHARLES TAYLOR, *SOURCES OF THE SELF* 17 *passim* (1989). See generally CHARLES TAYLOR, *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* (1992).

126. Michael Walzer, *The Communitarian Critique of Liberalism* 18/1 POL. THEORY 16, 17 (1990).

known German sociologist, Jürgen Habermas.¹²⁷ Habermas's premise is that the correct view of the system of rights in the liberal tradition does not ignore unequal social conditions or cultural differences, thus, eliminating the need for an alternative model to correct the individualistic design of the liberal state. Instead, the correction can be made through a consistent actualization of the system of rights in life contexts in which the individual's identity is shaped.¹²⁸ What Habermas envisions is a connection between the universalization of equal treatment of all identities and a differentiation of the legal system, in accordance with a democratic actualization of the system of rights, that will cater to the life contexts in which citizens safeguard their identities.¹²⁹ Such a dialogue will enable critics to clarify what they want to perpetuate and what they want to stop.

The constitutional framework Habermas envisions is based on the premise that the state must first provide an open communication structure and freedom of association. This will allow different cultural forms of life to advance reasons for their support and protection, and to formulate legal claims. Second, the constitutional state can only tolerate claims that are based on the acceptance of a common political culture, a common horizon of interpretation. This requires a mutual recognition of the existence of equal, but different cultural identities with different conceptions of the good. It also recognizes an "ethical integration of groups and subcultures with their own collective identities . . . uncoupled from their abstract political integration that includes all citizens equally."¹³⁰ Here, Habermas distinguishes between two forms of integration. On the sub-political level, as he calls it, the legal system must maintain its neutrality, *vis-à-vis* different cultural communities and sharpen its sensitivity to the diversity and equal integrity of

127. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State* in *MULTICULTURALISM* 107 (A. Gutmann ed., 1994).

128. *See id.* at 113.

129. By democratic, I mean that the affected groups must participate in the public debate on the appropriate interpretation of needs and on what is relevant to equal or unequal treatment in specific cases. *See id.* at 115-16.

130. *Id.* at 133-34.

the different life forms. Concurrently at the political level, citizens are integrated into a common political culture on the basis of equal citizenship. Most important, however, is his observation that the distinction between the two levels of integration must be maintained. "[I]f they are collapsed into one another, the majority culture will usurp state prerogatives at the expense of the equal rights of other cultural forms of life and violate their claim to mutual recognition."¹³¹ This is exactly the danger of the manipulation of the state and its institutions by partisan pressures discussed above.

The issues raised in these debates are pertinent to the South African situation for various reasons. First, the concept of governance in the general interest has never taken root as a fundamental characteristic of the modern state in South Africa. In the past, the state and its institutions served partisan interests at the expense of a disenfranchised majority. In post-apartheid South Africa, the state has assumed a partisan role in the interest of that same majority at the exclusion of other groups. As in the past, race is a financial asset that people do not freely and voluntarily waive. We need only to recall that it has taken a massive internal revolt and an unprecedented international sanction campaign to bring down the system that entrenched white minority rule in South Africa. When the entrenchment of interests has the additional backing of the Constitution,¹³² it becomes even more difficult to eliminate. This constitutional backing also hardens perceptions that the state does not belong to all, that it is not a *res publica*, but rather an instrument serving the interests of a specific group.

I am not questioning the historical imperatives justifying the current policy to advance formerly downtrodden rights and interests, merely noting the inevitability that certain groups will feel excluded and alienated by a partisan state. Indeed, government and other practices often enhance and confirm existing feelings of estrangement. Recently, a seasoned foreign correspondent illustrated this point by aptly describing the current affirmative action practice in South Africa as follows:

The American term "affirmative action" is used in public discourse about "bringing the blacks along," but what is really happening is the wholesale africanisation of busi-

131. *Id.* at 134-35.

132. See S. AFR. CONST. (Act 108 of 1996) § 9(2).

ness and government. The civil service has become the arena in which ANC loyalists are rewarded for services to the struggle. Obscure figures from the anti-apartheid movement have been catapulted into senior jobs for which they are unqualified. Big corporations, meanwhile, are finding that the assiduous pursuit of positive discrimination is the best way to curry favor with the government. Whites are becoming demoralised because they know that they will never be promoted.¹³³

Bloody conflicts between the police and colored communities around Johannesburg during the first week of February 1997 graphically illustrated the resentment of current government policies.¹³⁴ The cause of the conflict stems from the government policy to scrap millions in arrear service payments in black areas¹³⁵ coupled with a general feeling that the colored community has been marginalized by a government that caters only to black interests.

The remarks of persons interviewed in the enraged community are telling. One spoke of "a failing to embrace coloreds with the same empathy that saw service arrears in black townships being scrapped," another bemoaned the fact that "our people have no choice but to believe that they are a marginalized minority," and another still, that the "black government is squeezing every drop out of us so that we can subsidize the (black) squatters who are slowly infiltrating our neighborhoods." Just days before this event, a resident won a High Court suit against the Pretoria City Council¹³⁶ on the basis that the Council unfairly discriminated against mainly white ratepayers by having two systems of rates' assessment: a so-called flat rate in black areas and meter-assessed

133. Stephen Robinson, *The Ruination Theory Returning to South Africa*, DAILY TELEGRAPH (London), Feb. 1, 1997, available in 1997 WL 2281245.

134. See SUNDAY TIMES, Feb. 9, 1997, at 4.

135. In the eighties, the liberation movement embarked on a campaign for non-payment of services with a view to bring down white controlled local government structures. After winning the elections, the movement discovered that to turn the tide of non-payment was not going to be easy. In fact, most attempts have been dismal failures. The ranks of the non-payers are swelling, and individuals in other communities have suspended their dues in protest.

136. Walker v. Pretoria City Council, A1516/96.

rates in other areas. Furthermore, the Council used the income from the metered areas to subsidize other areas.

Second, the common horizon of interpretation or common political culture Habermas spoke about, is largely absent in South Africa. Politicians are quick to refer to the Constitution, its institutions and catalogue of rights to hail the new-found common value system and national identity in post-apartheid South Africa. Unfortunately, reality is much more complex. Since the new constitutional dispensation took effect, the government has imposed a value system on citizens which is inconsistent with their own. This is largely because government opinion leaders have drawn advisors from a narrow circle of like-minded "experts" with a strong individual rights bias.

In the area of social values, opinion polls have shown that the beliefs, preferences and values of politically powerful elite groups do not coincide with important elements in the attitudinal and value systems of members of the public and often of parties' own supporters. Three examples illustrate this point.¹³⁷ The Constitutional Court abolished the death penalty under the Interim Constitution in 1994.¹³⁸ Despite being hailed as a landmark judgment it was subsequently established that no less than 70% of the public still support the death penalty. The greater irony, however, is that 65.3% of ANC's own supporters also support the death penalty, while support for the death penalty among members of other parties is even higher. The second example deals with the legalization of abortion on demand in 1997.¹³⁹ With the exception of the Democratic Party supporters, who favor legalized abortion by a small majority (48.6%), the distribution of those not in favor is as follows: ANC (78.7%), National Party (73.7%), Inkatha Freedom Party (74.6%) and the Freedom Front (75.2%). Third, on pornography, the distribution among non-supporters is as follows: ANC (74.9%), National Party (80.5%), Democratic Party (67.5%), Inkatha Freedom Party (68.4%) and the Freedom Front (90.5%).

The compiler of the survey reached the following self-evident

137. See H. Kotzé, *The Working Draft of South Africa's 1996 Constitution; Elite and Public Attitudes to the Options*, KONRAD ADENAUER FOUND, OCCASIONAL PAPERS (1996).

138. See *S. v. Makwanyane* 1995 6 BCLR 665 (SA).

139. Choice on Termination of Pregnancy Act 92 of 1996.

conclusions:

This relatively "conservative" public opinion on contemporary social issues is clearly not in line with the more "liberal" thinking of the majority party, the ANC. In this case the views adopted by the government, not only on these specific sections of the Working Draft, but also in legislation, can clearly become out of step with the prevailing values of society.

Where government sets policy according to values vastly different from the values of the community, feelings of estrangement and distrust are bound to occur. These feelings raise the expectation that the state, if it wants to demonstrate an all-inclusive legal bond commensurate with the diverse needs and aspirations of society, will have to do more than adopt a laissez-faire policy of liberal tolerance. Creating constitutional space, within which certain communities may pursue self-chosen ends, is simply not good enough in a society where there is real danger that partisan interests will dominate and relationships of trust and confidence are already in a state of disrepair.¹⁴⁰ A laissez-faire policy in such circumstances may even confirm suspicions that public institutions are dumping legitimate concerns in constitutionally created "own areas" so that the state can pursue its partisan policies unhindered.

A detailed discussion of the mechanisms available to the state to meet these objections falls outside the scope of this Article. Note, however, that in recent times an international debate has evolved regarding the subject of minority rights protection and self-determination. In that discussion, progress has been made on the steps governments may take to accommodate the diversity of interests in their respective societies.¹⁴¹ In the South African con-

140. Here, one should not lose sight of public frustration with the administration of justice⁹ and the threats to personal security from an out-of-control crime wave in the country.

141. Cf. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* (1995); *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* (C. Brölmann, R. Lefeber and M. Zieck eds., 1993); *MODERN LAW OF SELF-DETERMINATION* (C. Tomuschat ed., 1993); K. Hailbronner, *The Legal Status of Population Groups in a Multinational State under Public International Law*, *Isr. Y.B on Hum. Rts* 127 (1991); G.J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 *STAN. J. OF INT'L. L.* 255 (1996).

text, there are at least two imperatives that should determine state policy on this issue whatever solution one considers. First, differential accommodation of groups has a much better chance of success than a uniform one. Second, the mechanism must aim at restoring the group's lost sense of belonging to a common body politic and must demonstrate respect for differential qualities and identities.